Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-992

In The
Supreme Court of the United States
October Term, 1985

CHARLES FREESE, Next Friend for HEIDI FREESE and Individually, and RENATE FREESE, Jointly and Severally,

Petitioners for Writ of Certiorari,

vs.

CORNING GLASS WORKS, a New York Corporation,

Respondent.

On Appeal from the United States District Court— Eastern District of Michigan; On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Submitted by:

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QUESTIONS PRESENTED FOR REVIEW

I. IS THERE ANY SPECIAL AND IMPORTANT REASON FOR THE SUPREME COURT TO GRANT WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17?

Respondent says	"No"
Petitioner says	"Yes"
Trial Court would answer	"No"
U.S. Sixth Circuit Court would answer	"No"

II. SHOULD THE RULE OF LAW BE PRESERVED THAT REQUIRES A PARTY CLAIMING SURPRISE TO ACT DILIGENTLY IN SEEKING RELIEF AND THAT LEAVES TO THE DISCRETION OF THE TRIAL COURT THE DETERMINATION OF WHETHER SURPRISE OR DILIGENCE EXISTS AND, IF SO, THE APPROPRIATE REMEDY?

Respondent says	"Yes"
Petitioner says	"No"
Trial Court says	"Yes"
U.S. Sixth Circuit Court says	"Yes"

LIST OF PARTIES

CORNING GLASS WORKS

LIST OF AFFILIATIONS

Corning Europe, Inc. (Paris, Avon)
Corning Enterprises Inc.
Borosil Glass Works, Ltd.
Corning Glass Foreign Sales Corporation
Watkins Glen International, Inc.
Wine Market, Inc.
Corning Hotel Corp.
Elmirn Aeronautical Corporation
Chemung Aviation Inc.
Horseheads Aeronautical Corp.
Components Incorporated
Corning Glass Int'l. Sales Corp.
COR LA/AF
Corning Japan Incorporated (Tokyo)
MetPath Inc.
HealthFirst Corp.
MetPath Information Services, Inc.
Stat Toxicology
Service of Boston Inc.
Statpath, Inc.
MetPath Laboratory Corporation
Personal Services Inc.
International Medical Services Inc.
MetPath Europe Limited
MetPath (U.K.) Ltd.
MetPath (Schweiz) A.G.
Laboratoire Riotton S.A.
Enzym - Labor
Dr. H. Weber A.G.
Health Profile Services Inc.
CBT Laboratories Inc.
New England Medical Laboratories Inc.
New England Medical Laboratories, Inc.
Connecticut Region, Inc.
Clinpath Lab Inc.
Arizona Laboratory Corporation

Australian Crown Crystal Inc.
K.C. Biological, Inc.
K.C. Int'l. Inc.
Genencor Inc.
Chr. Hanson Laboratorium S/A
Genetech, Inc.
Siecor Corporation
Superior Group, Inc.
Superior Cable Int'l. Corp.
Pittsburgh Corning Corporation
Dow Corning Corporation
Owens-Corning Fiberglas Corporation
Scientific Micro Systems, Inc.
Oximetrix, Inc.
Nutrisearch Co.
Doan Associates
PlessCor Optronics, Inc.
Steuben Partners, L.P.
Fairfield Venture Partners II, L.P.
Advent Techno-Venture Investment Corp.
Gilford Instrument Laboratories, Inc.
Gilford Instrument Int'l. Inc.
Ciba Corning Diagnostics Corporation
Ciba Corning Diagnostics Foreign Sales Corp.
Ciba Corning Diagnostics International Corp.
Ciba Corning Diagnostics GmbH
(Formerly Corning Medical GmbH)
Ciba Corning Diagnostics KK
(Formerly Corning Medical KK)
Ciba Corning Diagnostics Limited
Ciba Corning Diagnostics (HK) Limited
Ciba Corning Diagnostics, S.A.
(Future French Company)
Corning International Corp.
Corning France, S.A.
Sicover, S.A.
Societe E.I.V.S. S.A.
Corning S.p.A.
N.V. Corning Benelux, S.A.
Corning Iberica, S.A.

Corvire SARL
Sovcor, S.A.
CGISA (Panama)
Corning Venezolana, S.A.
CISSA (Manila, Seoul, Singapore)
Pacific Int'l. Corp.
Corning (H.K.) Limited
Glass Technologists PTE Ltd.
Pacific Glass Corp.
Corning Nederland BV (In Liquidation)
Crown Corning Ltd.
J.A. Jobling & Co. Pty. Ltd.
Corning Finance A.G.
Gilford Europe S.A.
Corning Limited
Corning (Holdings) Ltd.
Corning A.B.
Joquimica, S.A.
Malkin Ltd.
Acecrest Ltd.
Villabrook Ltd.
Corning Biosystems Ltd.
Specialist Dairy Ingredients
Samsung-Corning Co. Ltd.
Iwaki Glass Co., Ltd.
Iwaki Housewares Company
Radelcor Inst. Sales, Ltd.
Corning (Singapore) PTE Ltd.
Teddington Co., Ltd.
Rigolleau S.A.
Vitrofar S.A.
Cristamine S.A.
Vidplan S.A.
Corning KK
N-Cor Ltd.
TECOM
Universal Scientific Industrial Co., Ltd.
Corning Mexicans, S.A. de C.V.
Productos Cng. de Mexico, S.A. de C.V.
Vitrocrisa Kristal, S.A.

Corning GmbH
Draloric GmbH (In Liquidation)
QVF Glastechnik GmbH
Corning Keramik GmbH
Corning Keramik GmbH & Co. KG
Siecor GmbH (Not Finalized)
Siecor GmbH & Co. KG
Corning Investments Inc.
Pittsburgh Corning Europe N.V.
Pittsburgh Corning Scandinavia AB
Deutache Pittsburgh Corning GmbH
Pittsburgh Corning (U.K.) Ltd.
Pittsburgh Corning Nederland B.V.
Pittsburgh Corning France SARL
Pittsburgh Corning GmbH
Pittsburgh Corning (Schweiz) A.G.
Corning Brasil - Vidros Especiais Ltds.
Fibres Optiques Industries S.A.
Corning Canada, Inc.
Optical Fibres
Optical Waveguides Australia Pty. Limited

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OPINIONS AND JUDGMENTS DELIVERED BELOW

The opinions and judgments are adequately set forth in the petition.

JURISDICTION

The statement of jurisdiction is adequately set forth in the petition.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

There are none.

STATEMENT OF FACTS

This is a products liability case arising from injuries sustained by Heidi Freese, a minor, when a glass carafe she was carrying suddenly broke at the bottom, causing hot water to spill on and scald her right thigh.

Petitioners complain that they were surprised during respondent's opening statement at trial when respondent's counsel advised the jury that the carafe in question was not manufactured after 1971, then suggested that the carafe that broke was not the one recently purchased by the Freeses in approximately 1979, but rather a much older one manufactured prior to 1971. Specifically, respondent's counsel stated:

> Interestingly enough, the last time they made that particular style of design was in 1971. Now, that was an interesting fact. The last time it was made in 1971. I don't know, and we don't know, how the facts are going to explain that in August of 1979, they went to the store and bought that product off the shelf as a brand new product. Where was it from "71" to "79"? The last time we made it was in "71". (TR, 35)

Respondent's counsel then observed that the Freeses possessed two coffee carafes, the one that they had owned for a long time and a newly purchased one to replace another old one. Counsel advised that the jury would have a right to question how the buildup of lime deposits and scratches found by petitioners' expert could have occurred so quickly after purchase, and suggested that the real fact of the matter in this case was that Heidi Freese was carrying the older of the two carafes which has been misused by numerous people over a lengthy period of time.

Petitioners' counsel did not object to respondent counsel's opening statement, did not seek a continuance, and did not move for mistrial. He elected to permit the jury to continue to hear the evidence.

The evidence that the jury heard from respondent during the course of trial was that the carafe in question was made in 1971 and the first few months in 1972 (TR, 612, 679), that the latest it could have been in control of the carafe would have been 1973 (TR, 670), and this carafe had been gouged, struck and abused so severely that a crack had been created as a result thereof, and that it had been heated improperly. (TR, 511-518, 672) The jury also heard Mrs. Freese state that she knew how to care for the pot and did not use abrasives or otherwise wash or treat

it improperly. She stated that she didn't need to be told how to care for the pot, because she knew how, and that she was aware that if pots are scratched they can break. (TR, 422-425)

The pretrial pleadings do not support petitioners' claim that respondent's counsel concealed facts or theories of the case during discovery or otherwise engaged in misconduct. Paragraph 4 of petitioners' Complaint alleges that "some time prior to 1979, defendant placed into the stream of commerce, a Pyrex coffee carafe." The identical allegation is contained in petitioners' Amended Complaint filed over a year after the original. Petitioners' counsel obviously did not consider the specific date of manufacture important.

In Interrogatory 2, dated December 9, 1980, petitioners inquired how many carafes were manufactured per year. Respondent refused to answer on grounds that there was insufficient identification of the product and because petitioners would not permit respondent to inspect the product. The court determined that respondent should answer on the basis of a photograph provided by petitioners, noting that the respondent had not properly requested production of the carafe. Subsequently, respondent answered Interrogatory 2 as follows:

> The number of carafes manufactured per year varied. Shipment figures, which may differ on a yearly basis from manufacturing figures, indicate that the following numbers of carafes were shipped between 1970 and 1978 [Figures Omitted]

Petitioners' Interrogatory did not ask for the specific date of manufacture and never offered respondent more specific information to enable defendant to be precise

about the identity (make and model) of the carafe, even though petitioners were well aware that respondent believed it needed the information in order to answer properly. Additionally, petitioners did not follow respondent's Answer to Interrogatory 2 with a more precise interrogatary about the year of manufacture.

This lack of concern on petitioners' part for specific information about the year of manufacture of the carafe is evident in other documents prepared by petitioners. For example, in Interrogatories dated February 25, 1981, petitioners asked in Interrogatory 1: "Does, or has, the defendant within the past five years, manufactured any glass carafes for commercial use?" Petitioners also asked for information in Interrogatories dated March 6, 1981, for warnings, admonitions, or cautionary instructions transmitted to the purchasers of the "type of carafe referred to in plaintiffs' Complaint." Petitioners used the same general language in the Request for Produce filed the same date. However, petitioners' Complaint does not specify a type of carafe.

Additionally, petitioners filed Requests to Admit dated April 23, 1981, demanding that respondent admit that the carafe was manufactured prior to August 1979, and admit that the same was sold to the Freeses in August 1979. *Defendant admitted the manufacture was prior to 1979 and denied knowledge of the date of sale to the Freeses.* As the Court of Appeals noted during oral argument, if what the petitioners wanted was the date of manufacture, they never asked for the date, despite filing 17 sets of interrogatories, seven requests to produce, six motions to produce, and four requests to admit.

The opening statement by petitioners' counsel at trial focused on the theory of respondent's liability for failure to warn that the use of an abrasive in cleaning the glass carafe could cause scratches which would result in weakening of the carafe, thereby making it dangerous:

> The simplicity in this case is that whoever put that scratch in that carafe had no way of knowing that they should not use anything on the interior of the carafe that would put this scratch in there. (TR, 22)
>
> * * *
>
> So what happened in this case, and why we are here, the entire guts of the case is that they didn't give us any warning at all. Zero. (TR, 24)

Petitioners' counsel knew very well that the date of manufacture would be vital under his duty to warn theory, as is evidenced by his comments to the jury during opening statement:

> Now, the theory by which we are claiming plaintiff is entitled to prevail is one of what we call implied warranty, and one what we will call negligence, and perhaps there will be some discussion on express warranty. An implied warranty means that the product has got to be sold when leaves the manufacturer so that it's not defective or not reasonably safe. Your job in this case will be to determine whether or not when this product left it was unreasonably safe, because it did not have the proper warnings associated with its use. (TR, 27)

In fact most of the presentation of proofs at trial centered on the failure to warn theory, just as petitioners' counsel predicted to the jury. Contrary to their claim, petitioners' trial strategy was not changed at all.

As observed by the Court of Appeals during oral argument, any surprise sustained by petitioners did not occur

because of concealment by respondent but rather from inartful drafting of interrogatory questions by petitioners' counsel which were answered by respondent. The Court of Appeals also observed that the record did not support petitioners' claim of surprise since they failed to object to respondent counsel's opening statement, failed to seek a continuance, and did not move for mistrial. In rendering an opinion from the bench, the Court of Appeals found that respondent did not engage in misconduct, that petitioners failed to preserve any rights they had at trial, and that petitioners had ample opportunity during the course of a long weekend to return home to obtain whatever rebuttal testimony they needed, and the trial court did not abuse its discretion in denying petitioners' Motion for New Trial.

———o———

REASONS WHY WRIT SHOULD BE DENIED

I. THERE IS NO SPECIAL AND IMPORTANT REASON FOR THE SUPREME COURT TO GRANT WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17

Supreme Court Rule 17.1 reads as follows:

A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered.

(a) When a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; or has denied a Federal question in a way to conflict with the

> state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.
>
> (b) When a state court of last resort has decided a Federal question in a way in conflict with the decision of another state court of last resort or the Federal Court of Appeals.
>
> (c) When a state court or a Federal Court of Appeals has decided an important issue of federal law which has not been, but should be, settled by this court, or has decided a Federal question in a way in conflict with applicable decisions of this court.

Petitioner fails to come within any of the criteria set forth in said Rule.

First, petitioner does not allege that the Court of Appeals has rendered a decision in conflict with another Federal Court of Appeals on the matters involved herein. This is wise, inasmuch as the issue before the Sixth Circuit Court of Appeals in this case was merely one of applying traditional law applicable in every state and circuit court holding with respect to a duty to protect one's own interest by timely objecting, moving for continuance, or moving for mistrial, and the trial court's discretion to rule on the same.

The relative unimportance of this case is further underscored by the Court of Appeals own limitation to not recommend its opinion for full text publication but rather to deliver its opinion from the bench following oral argument. (Petitioner's Appendix 2). Unpublished opinions in the Sixth Circuit fall under Rule 24 of the Sixth Circuit which provides in relevant part:

> (b) Citation of unpublished decisions. Citation of unpublished decisions by counsel in Briefs and oral arguments in this court and in the District Courts within this court is disfavored, except for the purpose of establishing res judicata, estoppel, or law of the case.

The consequence of Rule 24 is that the unpublished opinions, such as the one involved herein, can have virtually no effect on the development of law. Unpublished opinions therefore lack the incidental but significant effect of precedent accorded published opinions and instead are necessarily opinions limited to the narrow function of addressing and determining the rights and liabilities of the parties immediately involved therein.

In short, we sbumit that this Court reserve its limited resources for review of cases raising germane and genuine issues of law involving questions of substantial magnitude in contrast to petitioners' request for Writ of Certiorari whose genesis lies in petitioners' complaints which were fully considered by the trial court and affirmed by the Sixth Circuit Court of Appeals.

II. THE RULE OF LAW SHOULD BE PRESERVED THAT REQUIRES A PARTY CLAIMING SURPRISE TO ACT DILIGENTLY IN SEEKING RELIEF AND LEAVES THE DETERMINATION AS TO THE EXISTENCE OF SURPRISE OR DILIGENCE OF THE PARTY TO THE DISCRETION OF THE TRIAL COURT

The logic of petitioners' request for relief is indeed puzzling. They seek abrogation of the rule that in order to obtain a continuance during trial for a ruling of mistrial, they need not request the continuance or move for

mistrial. It appears that petitioners would have the Supreme Court innovate a rule requiring the trial judge to read their minds and thus relieve them of the well-recognized responsibility of being reasonably alert to safe guard their own interests. Since even petitioners cannot be so illogical, we can only presume that the real purpose for framing their request for relief as they have is to elevate to constitutional proportions the very simple question of whether a complete review of the record reveals that grounds exist to grant petitioners a new trial in this cause. Both the trial court and the Sixth Circuit Court of Appeals have conducted such a review and found that plaintiffs' allegations lack merit.

It is a well-settled rule that the granting or refusing of a new trial rests within the discretion of the trial court and will be reviewed only for a clear abuse of discretion. *Spurlin v General Motors Corp,* 528 F2d 612 (5th Cir 1976); *Campbell v American Foreign SS Corp,* 116 F2d 926 (2nd Cir 1941); Cert denied, 313 US 573, 85 L Ed 1530, 61 S Ct 1959; *Aetna Casualty and Surety Co v Yates,* 112 F2d 350 (4th Cir 1941). As a matter of law and practicality, the conduct of the trial and the pretrial proceedings, including rules on motions and objections, is vested in the sound discretion of the trial court and will not be disturbed on review unless it affirmatively appears from the record that the trial court abused its discretion. *Rasmuessen Drilling, Inc v Kerr-McGee Nuclear Corp,* 571 F2d 1144 (8th Cir 1978), Cert denied, 439 US 862, 99 S Ct 183, 78 L Ed 2d 171. Even so, it is also well settled that the determination of a jury should not be set aside in granting a new trial, except in unsual circumstances. *Freid v McGraff,* 76 App DC 388, 133 F2d 350 (1942). For that rea-

son, when a trial judge denies a motion for new trial and thereby leaves the jury's determination intact, all factors underlying appellate review of the ruling press in favor of leaving the verdict undisturbed. *Paris v Chanclor,* 537 F2d 203 (5th Cir 1976).

The petitioners recite a miscellany of items they categorize as acts of misconduct on the part of respondent that intentionally deceived petitioners and caused them to be surprised and unprepared at trial. Respondent denies that these items constitute misconduct or an intent to deceive petitioners, and further denies that petitioners were surprised at trial. Indeed, petitioners make a number of references to being surprised but fail to indicate specifically the nature of the surprise or how it allegedly caused them to completely change their trial strategy; in fact, petitioners fail to even apprise the Supreme Court of what their strategy was, or what it was changed to. We submit that even a cursory inspection of the record indicates that the case was tried exactly as petitioners planned, that is, as a failure to warn case. However, even if petitioners were surprised at trial, the record and the opinions of the courts below make it clear that any surprise was the result of petitioners' neglect to concern themselves with the manufacturing date of the particular carafe.

In answer to petitioners' allegations of misconduct and intent to deceive, we refer this court to the pretrial pleadings set forth in the counter-statement of facts herein. These pleadings reveal that petitioners persisted in asking about the last day of the manufacture of the specific style of the carafe without first giving the respondent the opportunity to inspect the broken carafe. Indeed, respondent did not have the opportunity to inspect the carafe

for over one year after making the request, and when the opportunity did occur, it occurred two months prior to the date trial in this cause of action was initially scheduled to commence. Without inspecting the carafe, respondent could not positively state that it had manufactured the carafe, that the carafe was a specific size or model, and that the carafe was manufactured at a specific time. However, in response to the trial court's order that respondent should answer the petitioners' interrogatory, after viewing a photograph of the carafe, respondent did narrow the model of the carafe to a 8008. These problems of identification were reiterated during the trial testimony of Bruce Adams of respondent Corporation. (TR, 499-500)

With respect to the date of manufacture of the carafe, we would again point out that petitioners were never sufficiently concerned with that date to make a specific inquiry of respondent. Petitioners were primarily concerned with establishing only that the carafe was manufactured prior to the alleged date of purchase in 1979. Petitioners are incorrect in claiming that respondent was under an obligation to reveal the date of manufacture of the exact model and type of the carafe when petitioners never asked specifically for the information and refused to permit respondent the opportunity to inspect the actual carafe in question until after the cessation of discovery.

Because of these same facts and conditions, it cannot be said that respondent truly hid from petitioners its theory of defense until opening statement of trial. Until it obtained inspection of the carafe, respondent did not have any means of ascertaining the age of the carafe or the condition of the interior of the carafe with respect to

cracks caused by scouring and striking of objects, as well as the buildup of lime deposits. Moreover, these factors regarding the condition and age of the carafe would have been issues during trial regardless of the issue of petitioners having two carafes and being mistaken about which one was replaced by a new carafe. The proof of petitioners' claim was theirs to shoulder; it was not respondent's responsibility as if it were an affirmative defense. Petitioners cannot now attempt to claim that the date of manufacture was an affirmative defense which respondent was required to reveal, but instead concealed.

Petitioners' also claim that respondent failed to identify and disclose as an exhibit the catalog referred to in petitioners' brief. In response, we would simply observe that respondent named the catalogs as exhibits in the final pretrial order, and note that on the first day of trial, the trial court observed that both parties failed to comply with its order regarding disclosing exhibits, then stated:

> THE COURT: Yes. And the Court will say, gentlemen, that I might as well tell you right now, the Court is going through today as we have with regard to the exhibits, but the Court will say the counsel have not complied with—counsel on either side—the Court's Pre-trial Order. The Court is going to require that counsel bring into Court on Tuesday morning—although I have had the jury come back here at quarter till one, I want counsel here at least by 10 o'clock in the morning—and bring with them all exhibits to be presented in the case. The court reporter will be here and will mark those exhibits at that time, and the Court will direct that counsel exchange those exhibits with opposing counsel.
>
> Then, the Court would like opposing counsel on each case to take a sheet of paper and indicate in writing

> what objections, if any, there are to the respective exhibits which are intended to be offered. The Court requires this to be done in its Pre-Trial Order, and it has not been done. The Court believes that we'll greatly expedite the trial if the Court knows in advance which exhibits are going to be offered, and know that counsel has had an opportunity to examine them and knows in advance what objections are going to be made to those exhibits. (TR, 12-13)

It is clear that petitioners had access to the exhibit in advance of trial and that petitioners were not so blameless as they claim in their Petition to the Supreme Court. It is also clear, that by failing to request a continuance, the petitioners did not "reason" the date of manufacture of the carafe involved or attempt to take appropriate action to meet and/or verify the evidence, as they claim they would have, in their Petition. Moreover, the failure by petitioners to object, to move the court for a mistrial or a continuance, or to seek any other form of remedial relief, during or after respondent counsel's opening statement suggests that petitioners were not really concerned at that time with the date of manufacture.

Finally, insofar as petitioners' claim that respondent misled it by submitting the 1977 instructions, we would note that petitioners wanted the material in connection with the duty to warn theory, and that there was no difference in the 1971 and 1977 domestic carafes or their instructions with respect to that issue; in other words, the domestic carafes had no warnings printed on them, and the directions contained the same instructions with regard to care and cleaning. Petitioners have failed to show how submitting the 1977 instructions was deliberate, misleading, or prejudicial.

A number of courts have considered requests for new trial on grounds similar to the ones here. The following opinion of the court in *Melanson Company v Hupp Corporation*, 391 F2d 902 (3rd Cir 1968), is self-explanatory:

> This action for damages from breach of warranty and negligence due to an allegedly defective marine diesel engine sold to appellant is before the Court on appeal from a judgment for the defendant-appellees following a five week trial to the court. After consideration of the record, we find substantial evidence to support the district court opinion and judgment, including the finding of the trial judge that the damage to the engine did not result from the alleged defect in having cylinder liner sleeves a fraction of one hundredth of an inch below the engine block. *Also, since appellant concedes that it knew by the second day of the five week trial of appellee's contention that the location of the sleeves below the engine block was proper and that its counsel never asked for a continuance to produce evidence on this point until after the conclusion of the trial, its claim that it is entitled to a new trial on the ground of surprise is rejected. See Moylan v Siciliano,* 292 F2d 704, 705 (9th Cir 1961). The evidentiary rulings of the trial judge were justified by the record and do not constitute the reversible error. See F.R. Civ.P. 61. 391 F2d 903 (emphasis supplied).

Similarly, the court in *Moylan v Siciliano,* 292 F2d 704, 705 (9th Cir 1961), affirmed the trial court's denial of motion for a new trial based on appellants' contention that they were so "stunned" by the testimony of appellee's witnesses that they "could not gather their wits together" to advise their counsel of potential rebuttal witnesses:

> Litigants are required to be reasonably alert at trial in the protection of their own interests. If this record could be said to show reasonably genuine surprise

> on the part of appellants, the remedy would have been to ask for a continuance to allow appellants to "gather their wits" and prepare for the presentation of rebuttal testimony. *Cathedral Estates v Taft Realty Corp.*, 2 Cir, 1955, 228 F2d 85. Having failed to do this, and having permitted the cause to go to judgment, it is too late to seek an opening up of the issues, no proper grounds appearing. *Creedon v Loring*, 1 Cir, 1957, 249 F2d 714.

In *Exxon Corp v Exxene Corp*, 696 F2d 544 (7th Cir 1982), a motion for new trial was denied on the basis that when counsel for *Exxene* placed in evidence thirteen trademark registrations for the word "EXXON" that were not listed in the pretrial order, did not deprive Exxon of a fair trial because it had time to prepare an effective rebuttal but failed to do so:

> Exxon argues that the cross-examination and evidence concerning the 13 trademark registrations not listed in the Pre-trial Order violated that Order, was irrelevant and prejudicial, and caught Exxon by surprise. But there was no violation of the actual terms of the Pre-trial Order, and in any event the violation of a Pre-trial Order would not warrant an appellate courts ordering a new trial unless the violation so surprised the party complaining of it that it denied that party a fair hearing. It did not here. Exxon had time to prepare an effective rebuttal dealing with the validity of its own trademarks, a matter on which it is well-informed.

The trial court's ruling in the instant cause of action is consistent with other holdings that a district court is entitled to grant a new trial only if the admission of surprise testimony actually prejudiced the appealing party's case. See *Moore Federal Practice*, Paragraph 59.08 [2] at 5[illegible]1 (2nd Ed 1982).

In the instant cause, not only did petitioners' attorney fail to object to respondent counsel's comments during opening statement or move for a continuance or mistrial, but petitioners also had from six to ten days, including a long weekend, during which to seek whatever rebuttal testimony they thought was necessary.

The issues in this cause can be summed up by the court's language in *Curtis Publishing Company v Butts*, 351 F2d 702, 714 (5th Cir 1965):

> Yet, no objection to any portion of the arguments was raised until Curtis filed its motion for new trial nine days after the jury verdict was returned.
>
> The trial court correctly disposed of this matter in the following language:
>
> It is an elementary principle of federal law that a new trial will not be granted where a party seeks to raise for the first time, on a motion for a new trial, (the objection) that opposing counsel was guilty of misconduct in his argument to the jury, where such conduct was not excepted to during the trial.
>
> If, as Curtis's counsel now claims, the arguments were, among other things, "grossly improper and inflammatory", "intemperate and inexcusable", "appeals to passion and prejudice", "corruptions of the evidence", "completely unsupported by the evidence", *it is inconceivable to us that they would have delayed so long without raising the slightest hint of an objection.* Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended week and recess, and for nine days thereafter, leaves us with the conviction that they did not consider the arguments objectionable at the time they were delivered but made their claim as an afterthought.

Based on the foregoing, this Court should uphold the Sixth Circuit Court of Appeals' affirmation of the trial judge's denial of new trial on the ground that petitioners were not prejudicially surprised, and that petitioners failed to take remedial action, which is generally construed as a waiver or any objection to the allegedly surprising and prejudicial evidence. (Memorandum Opinion and Order, p. 2).

———o———

CONCLUSION

Petitioners have raised a number of issues for this court without showing the presence of actual prejudice, much less reversible prejudice, or pointing to appellate precedent supporting the abrogation of the well-established rule that parties at trial must be reasonably alert in protecting their own interests. Any surprise incurred by petitioners was a result of their own lack of diligence and mistakes rather than respondent's intentionally failing to reveal information or hiding a defense. Further, petitioners did not suffer the type of prejudice that would warrant the Supreme Court taking drastic action in abrogating the rule as urged by petitioners.

The trial court did not commit error in making its respective rulings, including its denial of petitioners' motion for new trial. The trial court's decisions were within its sound discretion exercised in full knowledge of the circumstances surrounding the lawsuit, including the conduct of both parties which the court several times found less

than praiseworthy but far from meriting the disturbing of the jury verdict of no cause for action in the favor of defendant-respondent.

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RELIEF REQUESTED

For the reasons set forth herein, respondent Corning Glass Works moves the court to deny the plaintiffs' Petition for Writ of Certiorari.

Respectfully submitted,

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